No. 77-390

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDIGIO CERILLI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the court of appeals erred in dismissing, for lack of jurisdiction, their interlocutory appeal from an order denying their motion to dismiss their indictment on grounds of prejudicial pretrial publicity.

1. The pertinent facts are set forth in the opinion of the court of appeals (Pet. App. A; 558 F. 2d 697) and may be summarized as follows. In February 1976, a grand jury of the United States District Court for the Western District of Pennsylvania charged petitioners Edigio Cerilli, Ralph Buffone, and Maylan Yackovich, officials of the Pennsylvania Department of Transportation and Pennsylvania Turnpike Commission, with conspiracy and nine substantive violations of the Hobbs Act (18 U.S.C. 1951), by using the power of their offices to extort money

from individuals leasing equipment to the State. The trial of those charges ended in a mistrial at petitioners' request after one of the jurors became ill during deliberations.

On August 5, 1976, the grand jury issued a superseding indictment, which repeated most of the allegations in the initial indictment but added an additional defendant, petitioner John Shurina, and six substantive counts. Petitioners moved to dismiss the second indictment, alleging that (1) a trial on those charges would expose them to double jeopardy,[1] (2) the prosecution was barred by the statute of limitations, and (3) prejudicial publicity generated by the United States Attorney's office after the mistrial precluded the possibility of a fair trial. In the alternative, petitioners sought a change of venue. After a hearing, the district court rejected petitioners' double jeopardy and statute of limitation claims, but held that it would be premature in advance of jury selection to dismiss the indictment or to grant a change of venue on grounds of prejudicial pretrial publicity (Pet. App. A18, A22-A23; 428 F. Supp. 801). The court therefore denied these motions without prejudice to their renewal if the *voir dire* of prospective jurors demonstrated that a fair and impartial jury could not be empanelled in the Western District of Pennsylvania (Pet. App. A19-A22).

Petitioners immediately filed a notice of appeal. After concluding that it had jurisdiction to review petitioners' double jeopardy claim prior to trial, the court of appeals affirmed the district court's rejection of that claim (Pet. App. A4-A5, A6-A9). The court held, however, that the denial of petitioners' motion to dismiss the indictment because of the statute of limitations or prejudicial pretrial

[1]Petitioner Shurina did not join in the double jeopardy claim.

publicity allegedly attributable to prosecutorial misconduct, and their motion for a change of venue, were not appealable prior to trial under the controlling jurisdictional statute, 28 U.S.C. 1291, because they neither were "final decisions" nor fell within the "collateral order" exception to the final judgment rule, as construed in *Abney* v. *United States*, No. 75-6521, decided June 9, 1977, and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (Pet. App. A5-A6). It therefore dismissed those portions of petitioners' appeal for lack of jurisdiction.

2. Petitioners argue that the district court's order denying their motion to dismiss the indictment on the basis of prejudicial pretrial publicity was a "final decision" within the meaning of 28 U.S.C. 1291 and, hence, was appealable prior to trial.[2] The statutory requirement of a final decision "in a criminal case means sentence." *Berman* v. *United States*, 302 U.S. 211, 212. The district court's order rejecting petitioners' pretrial publicity claim, which did not end the proceedings against petitioners but merely permitted the case to proceed to jury selection, obviously was not final in that sense, and petitioners do not claim otherwise. Rather, they contend that the order falls within the so-called "collateral order" exception to the final judgment rule.

The court of appeals correctly concluded, however, that the order challenged by petitioners on appeal failed to satisfy the threshold requirement for application of the "collateral order" doctrine, because it did not "constitute a complete, formal and, in the trial court, a final

[2]Petitioners do not dispute the court of appeals' conclusion that it did not have jurisdiction to entertain an interlocutory appeal of their change of venue and statute of limitations claims. Nor do petitioners challenge the court of appeals' rejection of their double jeopardy claim on the merits.

rejection" of petitioners' pretrial publicity claim. *Abney* v. *United States*, *supra*, slip op. 7. Recognizing that "dismissal of the indictments is not the appropriate result upon a motion to dismiss based upon pretrial publicity, at least until a *voir dire* may be conducted" (Pet. App. A21), the district court expressly rejected petitioners' motion without prejudice to its renewal after the *voir dire* examination. See *Jones* v. *Gasch*, 404 F. 2d 1231, 1238-1239 (C.A.D.C.), certiorari denied, 390 U.S. 1029. Thus, until it is determined at *voir dire* whether a fair and impartial jury can be empanelled and, if not, whether a change of venue or some other remedy short of dismissal would be adequate to ensure petitioners' right to a fair trial, the matters raised by petitioners' claim remain "open, unfinished [and] inconclusive." *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546.

Moreover, petitioners' additional contention in the district court—that the prejudicial publicity was the result of prosecutorial misconduct—did not state independent grounds for relief and thus did not render the order denying their motion to dismiss an appealable final decision. The central question raised by such a claim—as with any claim involving pretrial publicity—is "whether fairness to defendants may still be accomplished [despite the publicity] and not whether misconduct of the government warrants punishment which also forfeits the rights of society." *United States* v. *Abbott Laboratories*, 505 F. 2d 565, 571 (C.A. 4), certiorari denied, 420 U.S. 990. Since this question has not yet been finally resolved by the district court, the court of appeals correctly held

that it was without jurisdiction to review petitioners' claim.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

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[3]Because the district court's order on its face fails to meet "*Cohen's* threshold requirement of a fully consummated decision," *Abney* v. *United States*, *supra*, slip op. 7, there is no reason to hold this case pending disposition of *United States* v. *MacDonald*, No. 75-1892, certiorari granted, June 20, 1977, which presents the question whether a pretrial order denying a motion to dismiss an indictment on speedy trial grounds is immediately appealable. We note, however, that, should the district court finally reject petitioners' pretrial publicity claim, petitioners still would not be entitled to obtain interlocutory appellate review of that order, because any error in the ruling "may be reviewed effectively, and, if necessary, corrected if and when a final judgment results." *Abney* v. *United States*, *supra*, slip op. 12. Petitioners' contention is indistinguishable from any other due process claim that some defect in the proceedings has denied the accused a fair trial. Such claims are mooted if the trial ends in an acquittal, and may be fully vindicated on an appeal from the final judgment in the event of a conviction. See, *e.g.*, *Rideau* v. *Louisiana*, 373 U.S. 723; *Sheppard* v. *Maxwell*, 384 U.S. 333. As the remand for a new trial in cases such as *Sheppard* illustrates, even prejudicial publicity generated by the government does not create a right not to be tried. Furthermore, the fact that pretrial vindication of such a claim would eliminate the need to hold a trial at all, in the unlikely event that the prejudice was irremediable, is not a sufficient justification for permitting an immediate appeal. *Cobbledick* v. *United States*, 309 U.S. 323, 325-326; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30.